may subsequently make. The implication is that the relations requisite for such liens as the statute mentions must be between the creditor and the ship, not between the creditor and the shipowner, since the ship is "an entity capable of entering into relations with others, of acting independently, and of becoming responsible for her acts." Here the material man had furnished coal to the shipowner but it was the shipowner which had furnished the ship, so that no maritime lien was created.

Detroit Mich. G. L. CANFIELD.

THE RIGHT OF A JURY IN A CRIMINAL CASE TO RENDER A VERDICT AGAINST THE LAW AND THE EVIDENCE.—One George D. Horning was convicted of the criminal offense of doing business as a pawnbroker in the District of Columbia without a license. The jury, which rendered the verdict of guilty, were told by the court, in the course of the charge, that there really was no issue of fact for them to decide; that the evidence showed a course of dealing constituting a breach of the law, and that they were not warranted in capriciously saying that the witnesses for the government and for the defendant were not telling the truth; that it was their duty to accept the exposition of the law given them by the court; and that while, in a criminal case, the court could not peremptorily instruct them to find the defendant guilty, if the law permitted it he would do so in this case. The judge concluded his charge as follows:

"In conclusion I will say that a failure to bring in a verdict in this case can arise only from a wilful and flagrant disregard of the evidence and the law as I have given it to you and a violation of your obligation as jurors. Of course, gentlemen, I cannot tell you in so many words to find defendant guilty, but what I say amounts to that."

On a writ of certiorari to the Supreme Court of the United States, it was held by Justices Holmes and four concurring judges that there was no error in these instructions. Justice Brandeis and three other judges dissented. This was the case of *Horning* v. *District of Columbia,* 41 Sup. Ct. Rep. 53, decided November 22, 1920.

Justice Holmes said that the judge could not direct a verdict of guilty, for "the Jury has the *power* to bring in a verdict in the teeth of both law and facts", but that he had not really done so in this case, for "the jury were allowed the *technical right,* if it can be so called, to decide against the law and the facts."

Justice Brandeis said that in his opinion the charge of the court amounted to a "moral command", and was as much the direction of a verdict as though made "in so many words."

What the trial judge did in this case was, in effect, to inform the jury that it was their *duty* as jurors, under the oath which they had taken, to find the defendant guilty on the undisputed facts and on the law which he had laid down, but that he could not take any steps to compel them to do their duty further than to urge them to do it. Here was a duty, then, which could not be enforced, and a breach of which could not be punished. Did it fol-

low that the duty to find the defendant guilty was only a moral, not a legal, duty, and that therefore the jury, while morally bound, were legally free?

In the leading case of *Sparf and Hansen* v. *United States,* 156 U. S. 51, it was admitted by all the judges that the jury had the *power* to go against the law as laid down by the court, but the majority held that they had no *legal right* to do this, while the minority argued with great skill and learning that they had both the power and the legal right. In the *Horning* case the majority held that the jury had the *power* and were allowed the *technical right* to go against the law and the evidence, and therefore there was no error. Is it to be concluded from this that the court has shifted away from the rule so laboriously worked out in the *Sparf and Hansen* case, and has come to recognize the right of the jury to decide the law?

If Justice Holmes meant by "technical right" a real legal right, his view is not in accord with the *Sparf and Hansen* case. But he does not seem to have meant this. He says "the jury were allowed the technical right, *if it can be so called,* to decide against the law and the facts." What happened was that the jury were given the opportunity to use their power to do this, but were told that they *ought not* to do it. They were not told that they *could not* do it. The judge made it clear that while their duty was to convict, there was no agency for enforcing that duty except their own consciences. This might seem to indicate that the duty was a merely moral duty, and that while they had a legal right to ignore the judge's instructions they had no moral right to do so. But the law deals with legal, not moral concepts, and if the court, as a court of law, could properly say that it was their duty to follow his views, that duty must have been a legal duty. There is nothing incongruous in a legal duty which the law does not or cannot enforce. Its unenforceable character does not relegate it to the realm of morality. There are many instances of imperfect legal rights, where the customary union between the right and its enforcement by legal action has been for some special reason severed, and where the maxim *ubi jus ibi remedium* does not apply. SALMOND, JURISPRUDENCE, Sec. 78. Claims against sovereign states are outstanding examples. One may perhaps get a judgment against the state, but there is usually no means of positive enforcement of that judgment. But the claims should properly be deemed legal, not merely moral.

Holland says that jurisprudence is specifically concerned only with such rights as are recognized by law and enforced by the power of the state. JURISPRUDENCE [12th ed.], 82. But this is too broad a statement. As Dicey points out, "The distinction between the recognition and the enforcement of a right deserves notice. A court recognizes a right when for *any purpose* the court treats the right as existing. * * * But our courts constantly recognize rights which they do not enforce." CONFLICT OF LAWS [2nd ed.], 31. 32. The statute of limitations, as shown by Salmond, does not extinguish a debt, thereby destroying the right, but merely prevents an action for its recovery. The right remains "for all purposes save that of enforcement." JURISPRUDENCE. Sec. 78.

Now, the court held in the *Sparf and Hansen* case that the legal right to

determine the law was in the court. But while the judiciary recognizes this right it does not enforce it. It recognizes it as a means for influencing, not for controlling, the action of the jury. The right exists for a legitimate legal purpose, but that purpose is not enforcement. The right is therefore an imperfect legal right, or a right subject to a procedural limitation. And when Justice Holmes, in *Horning's* case, says that the jury have a "technical right" to go against the law and the facts, he seems to be merely pointing out this imperfection which the law recognizes in the right of the court to determine the law. The "technical right" of the jury is only the restriction placed upon the right of the court. To say that the court has the right to determine the law but that the jury have the technical right to disregard it, appears to be only another way of saying that the court has the right to determine the law but has no means of enforcing its right against the jury.

If this was the situation in which the law placed the judge and the jury, it was incumbent upon the trial judge to explain it to the jury and not to mislead them by claiming not only the right to determine the law, which he had, but also the right of enforcement, which he did not have. The judge did explain this to the jury. He told them that it was their legal duty to find the defendant guilty, but that he was not permitted by the law to compel them to perform that duty. He made it sufficiently clear that their duty was imperfect in its obligation and was unenforceable by the court. This was entirely consistent with the case of *Sparf and Hansen.*

Justice Brandeis disapproved of the action of the trial court because he believed it amounted to a moral command to convict the defendant. If there was error here, the fault lay, not in telling the jury that they ought to convict, but in failing to make it perfectly clear that the law left the performance or non-performance of this legal duty wholly to the conscience of the jury. In other words, the moral command, if there was one, consisted in the failure to disclose the unenforceable and imperfect character of the duty to follow the law as given by the court. It was at most a moral advantage taken by the court resulting from an incomplete and misleading statement of the nature of the legal duty resting upon the jury,—the same sort of moral compulsion which frequently flows from incomplete instructions. But there is nothing in this dissenting opinion, any more than in the prevailing opinion, which conflicts with the *Sparf and Hansen* case. E. R. S.

CITY PLANNING—LOCATION OF STREETS AND ESTABLISHMENT OF BUILDING LINES.—In 1917, Connecticut, by law authorized Windsor to create a town planning commission "to make surveys and maps, section by section * * * showing locations for any public buildings, highways, or streets, including street building and veranda lines." Such map was to be filed in the town clerk's office, and notice given to the owners for a hearing; after such hearing, the commission was to decide, and file a map in accord with its decision; a right of appeal to court was reserved to an aggrieved party; and no street was to be opened until the land necessary was appropriated under eminent domain proceedings. A town planning commission was appointed, and made